

EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT

CONTEMPT

BUT WERE AFRAID TO ASK!

(for fear of being held in contempt)



Presented by M. Keith Siskin, Circuit Court Judge

April 9, 2013

1. BASIS OF TRIBUNAL'S AUTHORITY

(A) Inherent Power of the Courts:

“The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.” Ex Parte Robinson, 86 U.S. 505, 510 (1873).

“The power of courts to punish for contempt is of immemorial antiquity, and is inherent in all courts as a necessary power belonging to them in order to enable them to accomplish the purposes for which they were designed...” Graham v. Williamson, 164 S.W.2d 781, 782 (Tenn. 1914).

(B) Specific Powers Regarding Punishment:

Circuit, Chancery, & Appellate Courts:

\$50.00 fine and/or 10 days in jail (T.C.A. § 29-9-103)

General Sessions Courts:

\$50.00 fine and/or 10 days in jail (T.C.A. § 16-15-713)

→ but no jail time if Judge is not licensed to practice law!

Juvenile Courts:

\$50.00 fine and/or 10 days in jail (T.C.A. § 37-1-158)

Municipal Courts:

\$50.00 fine (T.C.A. § 16-18-306)

→ Metro can incarcerate for 5 days and assess \$10.00 fine for failure to appear (T.C.A. § 29-9-108)

Legislature:

“Each House may punish by imprisonment, during its session, any person not a member, who shall be guilty of disrespect to the House, by any disorderly or any contemptuous behavior in its presence.”
(Tenn. Const., Art. II, § 14)

(C) Order in Question Must be Clear and Unambiguous:

See Long v. McCallister-Long, 221 S.W.3d 1, 14 (Tenn. App. 2006), *perm. app. denied* 1/29/07; Konvalinka v. Chattanooga-Hamilton Co. Hospital Authority, 249 S.W.3d 346, 355-56 (Tenn. 2008).

2. CIVIL vs. CRIMINAL: KNOW THE DIFFERENCE!

(A) Civil Contempt:

Purpose is to compel performance with a Court Order. Defendant has the “keys to the jail,” and can purge contempt by complying with the Order. Defendant must have ability to comply at time of contempt hearing. *See Ahern v. Ahern*, 15 S.W.3d 73, 79 (Tenn. 2000).

Burden of proof is preponderance of the evidence. *Doe v. Board of Professional Responsibility*, 104 S.W.3d 465, 474 (Tenn. 2003).

Example: [ADA Banji Sokoya’s favorite case] *Black v. Black*, 362 S.W.2d 472 (Tenn. App. 1962), *perm. app. denied 11/9/62*:

→ Father who failed to pay child support was incarcerated by trial court until payment of arrears or “until an adjustment thereof satisfactory to both parties and satisfactory to the Court has been made” - even though father argued that this ruling meant “that he must remain in jail for the remainder of his life.” Upheld by Court of Appeals.

(B) Criminal Contempt:

Used simply to punish an individual for some act that offends the Court and its administration of justice. Defendant cannot be freed by eventual compliance. *See Ahern* at 79.

Defendant is entitled to many of the constitutional protections afforded any other criminal defendant, such as the presumption of innocence, right not to incriminate one’s self, right to notice, and right to have guilt proven beyond a reasonable doubt. *Storey v. Storey*, 835 S.W.2d 593, 599 (Tenn. App. 1992).

No right to jury trial. *Ahern* at 82.

Criminal contempt is either **direct** or **indirect**:

→ Direct = Disruptive or disobedient acts committed in the Court’s presence. Court may impose summary punishment for these acts when there is a need to act swiftly and firmly to prevent contumacious conduct from disrupting a judicial proceeding. *See Jones v. Jones*, No. 01A01-9607-CV-00346, 1997 WL 80029 at *3 (Tenn. App. 1997).

→ Indirect = Contemptuous acts committed outside the Court’s presence. May be punished only after providing Rule 42(b) notice. *Id.*

(C) Right to Attorney Applies in Both: Tenn. Sup. Ct. R. 13(d)(1).

(D) Willfulness Required for Both: *See Ahern* at 78.

3. CRIMINAL CONTEMPT PROCEDURES

(A) Tenn. R. Crim. P. 42(b) Notice: (See attached example)

(1) *Content of Notice.* The criminal contempt notice shall:

(A) state the time and place of the hearing;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the criminal contempt charged and describe it as such.

(2) *Form of Notice.* The judge shall give the notice orally in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by a show cause or arrest order.

(B) Bail:

Pursuant to Rule 42(b)(3), defendant “is entitled to admission to bail as provided in these rules.” Additionally, pursuant to Tenn. R. Crim. P. 32(d), “A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case.”

(C) Guilty Pleas Must be Handled Just Like Other Criminal Offenses!

Tenn. R. Crim. P. 11(b) requires judges to engage in a particular dialogue with defendants before accepting guilty pleas in criminal cases. (See attached rule).

“[I]n criminal contempt proceedings, the trial judge *shall* comply with Rule 11(b) by addressing the defendant *in person, in open court*, engaging in the requisite dialogue and then making the individualized determinations the rule requires *before* accepting any guilty plea, including without limitation, making the determination that the proposed sentence is appropriate under the circumstances.” Baker v. Baker, No. M2010-01806-COA-R3-CV, 2012 WL 764918 at *10 (Tenn. App. 2012).

Rule 11(b) must be followed by “*any* court accepting a guilty plea.” Id., citing State v. McClintock, 732 S.W.2d 268 (Tenn. 1987).

(D) Be Wary of Agreed Orders

Judge Cottrell’s concurring opinion in Baker suggests that hearings should be required to set punishment. After all, can a private attorney negotiate on behalf of the Court whose Orders have been violated??

(E) No Appeal of Acquittal Permitted

Double jeopardy bars appeal. Overnight Transportation Co. v. Teamsters Local Union No. 480, 172 S.W.2d 507, 510 (Tenn. 2005).

4. COMMON MISTAKE: TRYING CIVIL & CRIMINAL CONTEMPT ACTIONS TOGETHER

(A) Don't Do It!

“One who does not know until the end of litigation what his procedural rights in trial are, or may have been, has no such rights.” United States v. United Mineworkers, 330 U.S. 258, 374 (1947) (Rutledge, J., dissenting).

“[C]ivil and criminal proceedings should not be tried simultaneously because of the significant differences in the respective burdens of proof and procedural rights accorded to the person accused of contempt. Trial court procedure is ‘fundamentally flawed’ when the notice requirements of Rule 42(b) have not been met and when civil and criminal contempt actions are tried simultaneously.” Weissfeld v. Weissfeld, No. E2004-00143-COA-R3-CV, 2004 WL 2070979 at *5 (Tenn. App. 2004) (Internal citation omitted).

→ Judge (now Justice) Sharon Lee wrote the Court of Appeals’ Opinion

(B) Problematic Because of Tenn. R. Crim. P. 42(b) Requirements:

“The Tenn. R. Crim. P. 42(b) notice must *specifically* charge a party with criminal contempt and must succinctly state the facts giving rise to the charge. Because the same conduct can constitute both civil and criminal contempt, the Tenn. R. Crim. P. 42(b) notice eliminates any possible confusion concerning the nature of the proceeding.” Jones v. Jones, No. 01A01-9607-CV-00346, 1997 WL 80029 at *3 (Tenn. App. 1997) (Emphasis Added).

→ Judge (now Justice) William Koch wrote the Court of Appeals’ Opinion

(C) Why Risk It?

In a recent case, the Middle Section of the Court of Appeals affirmed the trial court’s handling of a “mixed” civil & criminal contempt trial, but limited its holding to the “unique circumstances” of the case. *See Duke v. Duke*, No. M2009-02401-COA-R3-CV, 2012 WL 1971144 (Tenn. App. 2012), *perm. app. denied 11/1/12*.

The better practice is to elect your remedy and eliminate a potential issue for appeal!

5. NO SIX-MONTH “CAP” FOR CHILD SUPPORT CONTEMPT

(A) T.C.A. § 36-5-104 is not a contempt statute:

§ 36-5-104. Failure to comply with order or decree; imprisonment

(a) Any person, ordered to provide support and maintenance for a minor child or children, who fails to comply with the order or decree, may, in the discretion of the court, be punished by imprisonment in the county workhouse or county jail for a period not to exceed six (6) months.

Rather, this is a general criminal statute. The penalty imposed conforms with the definition of a misdemeanor stated in T.C.A. § 39-11-110, which provides that all violations of law punishable by fine or confinement for less than one year, or both, are denominated misdemeanors. *See State v. Hill*, No. M2011-02233-CCA-R3-CD (Tenn. Crim. App. 2012).

Defendant is entitled to grand jury action as requirement to invoke jurisdiction of trial court. This is a constitutional right, and without a written waiver, there can be no valid conviction. *Id.*

Defendant has right to trial by jury. *Latham v. Walker*, 914 S.W.2d 887, 889 (Tenn. 1996).

Appeals heard by Court of Criminal Appeals. *See Hill* at *2.

(B) Compare General Contempt Statute:

§ 29-9-103. Fines and penalties

(a) The punishment for contempt may be by fine or by imprisonment, or both.

(b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars (\$50.00), and imprisonment not exceeding ten (10) days, and, except as provided in [§ 29-9-108](#), all other courts are limited to a fine of ten dollars (\$10.00).

Under this statute, a defendant may be sentenced to ten days **per count** of contempt. *See Strzelecki v. McGriff*, 2000 WL 48501 (Tenn. App. 2000), *citing* T.C.A. § 40-35-115(b)(7) (criminal sentencing statute).

→ No six-month cap.

6. JUVENILE COURT CONSIDERATIONS

(A) Same Powers as Circuit & Chancery Courts:

§ 37-1-158. Contempt

The court may punish a person for contempt of court for disobeying an order of the court or for obstructing or interfering with the proceedings of the court or the enforcement of its orders by imposing a fine or imprisonment as prescribed for circuit, chancery or appellate courts pursuant to title 29, chapter 9.

(B) Magistrates Have Contempt Powers:

T.C.A. § 37-1-107 provides, in pertinent part, as follows:

(b) The judge may direct that any case or class of cases shall be heard in the first instance by the magistrate in all cases wherein the juvenile court has jurisdiction in the manner provided for the hearing of cases by the court.

(c) A magistrate has the same authority as the judge to issue any and all process. The magistrate in the conduct of the proceedings has the powers of a trial judge.

Example: Court Clerk was held in civil contempt for failing to produce missing files as ordered by Magistrates. Juvenile Judge (Davenport) upheld contempt ruling at *de novo* rehearing. Court of Appeals affirmed, holding “that the juvenile court referees [now known as Magistrates] had authority to hold the court clerk in contempt and have him incarcerated until the files were produced, and that the evidence supports the trial court’s finding that the court clerk willfully disobeyed the referees’ lawful order.” In re Lineweaver, 343 S.W.3d 401, 403 (Tenn. App. 2010), *perm. app. denied* 8/25/10.

(C) Know Where & When to Appeal:

A judgment of contempt is a final Order and appealable as of right even if the proceeding out of which the contempt arose is not complete. Hall v. Hall, 772 S.W.2d 432, 435-36 (Tenn. App. 1989); State v. Green, 689 S.W.2d 189, 190 (Tenn. Crim. App. 1984). Appellate jurisdiction to review contempt decree lies with whichever appellate court would have jurisdiction to review the decree of the trial court in the principal action. B.H. Stief Jewelry Co. v. Walker, 256 S.W.2d 392, 395 (Tenn. App. 1952), *perm. app. denied* 3/6/53.

Most civil appeals from Juvenile Court are made to the Court of Appeals, within 30 days. *See* T.C.A. § 37-1-159(g). However, appeals of dependency & neglect, delinquent, & unruly cases are made to the Circuit Court, within 10 judicial days. *See* T.C.A. § 37-1-159(a).

7. SOME FRIENDLY ADVICE

(A) Be Nice During Depositions!

Court of Appeals upheld finding of direct criminal contempt against *pro se* party for conduct during a deposition. The party “repeatedly used foul language, and uttered numerous insults to the [opposing] attorney.” Court of Appeals found that the party “should have been aware that any statement he made at deposition could have been presented to the court, and that for all intents and purposes he cursed and insulted the opposing attorney in the presence of the court, just as if he were on the witness stand.” Dargi v. Terminix Int’l Co., 23 S.W.3d 342, 345 (Tenn. App. 2000).

(B) Don’t Violate Orders of Protection!

T.C.A. § 36-3-610(a):

- “Upon violation of the order of protection or a court-approved consent agreement, the court may hold the defendant in civil or criminal contempt and punish the defendant in accordance with the law.”

(C) Don’t Ignore Chancery Petitions!

T.C.A. § 21-1-301(a):

- “If the defendant upon whom process has been served fails to appear and defend in the time required by law, the bill may be taken for confessed; or the complainant may proceed by process of contempt to compel an answer.”

(D) Don’t Ignore Discovery Orders!

Tenn. R. Civ. P. 37.02. Failure to Comply With Order:

- “If a deponent; party; an officer, director, or managing agent of a party; or, a person designated under [Rule 30.02\(6\)](#) or [31.01](#) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under [Rule 37.01](#) or Rule 35, or if a party fails to obey an order entered under [Rule 26.06](#), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * *

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;”

8. ALSO NOTEWORTHY

(A) Other Judicial Officers with Contempt Powers:

Child Support Magistrates - T.C.A. § 36-5-403

- “The magistrate shall have the same authority and power as a circuit court judge to issue any and all process and in conducting hearings...”

Special Masters - Tenn. R. Civ. P. 53.02

- “Subject to the specifications and limitations stated in the [appointment] order, the master has and shall exercise the power to regulate all proceedings in every hearing before him or her and to do all acts and take all measures necessary or proper for the efficient performance of the duties under the order.”

(B) Contempt: It’s Not Just for Litigants Anymore:

Witness held in contempt during trial for refusing to produce document as orally commanded by Chancellor. Huggins v. Follin, 500 S.W.2d 435 (Tenn. 1973).

Sheriff held in contempt for refusing to release prisoner as ordered by the Court. In re Vanvaver, 12 S.W. 786 (Tenn. 1890).

Attorney held in contempt for refusing to accept appointment for indigent defendant. State v. Jones, 726 S.W.2d 515 (Tenn. 1987).

Juror held in contempt for refusing to deliberate. State v. Wakefield, No. M2007-02813-CCA-R3-CD, 2009 WL 137225 at *1 (Tenn. Crim. App. 2009).

Entire Jury held in contempt for refusing to return a verdict for defendant after trial judge ordered them to do so. Moore v. Standard Life & Accident Ins. Co., 504 S.W.2d 373, 374 (Tenn. App. 1972), *perm. app. denied* 7/17/72.

President of the United States held in contempt for violating discovery Orders. Jones v. Clinton, et al., 36 F. Supp. 2d 1118 (E.D. Ark. 1999).

(C) Failure to Pay Court-Ordered Attorney’s Fees in Divorce Case is Contempt:

“In Tennessee, judgments for attorney’s fees are judgments for alimony. The trial court may imprison the husband for contempt for failure to comply with an order to pay the wife’s counsel fees.” Merritt v. Merritt, No. 02A01-9108-CH-00175, 1992 WL 220160 at *7 (Tenn. App. 1992), *citing* Bradshaw v. Bradshaw, 133 S.W.2d 617 (Tenn. App. 1939).

- But attorney’s fees arising out of post-divorce proceedings are likely not subject to contempt for nonpayment. *See* Weinstein v. Heimberg, 490 S.W.2d 692, 696 (Tenn. App. 1972).

9. LAST, BUT NOT LEAST

The Most Contemptuous Motion Ever Filed:

“Inmate plaintiff’s complete disregard of and noncompliance with explicit court order to show cause why Rule 11 sanctions should not be imposed upon him for filing motion for improper purposes warranted dismissal with prejudice; motion which plaintiff filed was entitled “Motion to Kiss My Ass” in which he moved “all Americans at large and one corrupt Judge Smith [to] kiss my got [sic] damn ass sorry mother f**ker you.” Washington v. Alaimo, et al., 934 F. Supp 1395 (S.D. Ga 1996).

Tenn. R. Crim. P. 11(b)

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) *Advising and Questioning the Defendant.*- Before accepting a guilty or nolo contendere plea, the court shall address the defendant personally in open court and inform the defendant of, and determine that he or she understands, the following:

- (A) The nature of the charge to which the plea is offered;
- (B) the maximum possible penalty and any mandatory minimum penalty;
- (C) if the defendant is not represented by an attorney, the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and every other stage of the proceeding;
- (D) the right to plead not guilty or, having already so pleaded, to persist in that plea;
- (E) the right to a jury trial;
- (F) the right to confront and cross-examine adverse witnesses;
- (G) the right to be protected from compelled self incrimination;
- (H) if the defendant pleads guilty or nolo contendere, the defendant waives the right to a trial and there will not be a further trial of any kind except as to sentence;
- (I) if the defendant pleads guilty or nolo contendere, the court may ask the defendant questions about the offence to which he or she has pleaded. If the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against the defendant in a prosecution for perjury or aggravated perjury; and
- (J) if the defendant pleads guilty or nolo contendere, it may have an effect upon the defendant's immigration or naturalization status, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea.

(2) *Insuring That Plea Is Voluntary.*- Before accepting a plea of guilty or nolo contendere, the court shall address the defendant personally in open court and determine that the plea is voluntary and is not the result of force, threats, or promises (other than promises in a plea agreement). The court shall also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the district attorney general and the defendant or the defendant's attorney.

(3) *Determining Factual Basis for Plea.*- Before entering judgment on a guilty plea, the court shall determine that there is a factual basis for the plea.

IN THE _____ COURT FOR RUTHERFORD COUNTY TENNESSEE
AT MURFREESBORO

_____ ,)	
)	
Petitioner,)	
)	
v.)	No. _____
)	
_____ ,)	
)	
Respondent.)	

CONTEMPT CONSTITUTIONAL NOTICE

TO: _____

NOTICE OF CONSTITUTIONAL RIGHTS (Please read carefully):

1. This notice confirms that you are being charged by the above-named party with **CRIMINAL CONTEMPT**, pursuant to Tennessee Code Annotated § 29-9-101 et seq., for violation of the previous Order of this Court which could result in your being jailed for a maximum period of ten days, and/or a fine of \$50.00 for each act of contempt set forth in the Petition.

2. As to the charges of criminal contempt, you have certain constitutional rights which you should read carefully:

(a) You have the right to be represented by counsel, and if you are unable to afford counsel, the Court will appoint an attorney for you.

(b) You have the right to have guilt proven against you beyond a reasonable doubt, with the burden of proof being on the Petitioner.

(c) You have the right against self-incrimination, which includes the right to remain silent as to the allegations against you in the attached Petition for Contempt.

(d) You have the right to a presumption of innocence until such time as the allegations of guilt are proven by the Petitioner, against you, beyond a reasonable doubt.

(e) You have the right to have notice of the charges placed against you in a reasonable time to prepare a defense pursuant to the terms of Rule 42(b) of the *Tennessee Rules of Criminal Procedure*.

(f) You are not entitled to a jury trial at this time for a violation of Tennessee Code Annotated § 29-9-101 et seq.

3. This information is to serve as a notice to you or through your attorney of record of all of your constitutional rights in compliance with current state law regarding criminal contempt charges filed pursuant to Tennessee Code Annotated § 29-9-101 et seq.

Respectfully submitted,

Attorney for Petitioner

CERTIFICATION

An exact copy of the foregoing has been attached to the Petition for Criminal Contempt filed against _____, on this the _____ day of _____, 20____.

Attorney for Petitioner